

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1092 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

NAREN ADVERTISING & MARKETING

Versus

STATE BANK OF SAURASHTRA

Appearance:

MR AMAR N BHATT for Petitioners
RULE SERVED for Respondent No. 1, 2

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 21/11/2000

ORAL JUDGEMENT

1. Naren Advertising and Marketing, a Partnership firm (original plaintiff No.1) and Narendra Chandulal Shah (original plaintiff No.2) who are also petitioners in this revision application have challenged the judgment

and order dated 14th August, 2000 passed by the Judge, City Civil Court, Ahmedabad in Civil Suit No.5962 of 1988. The learned Judge was please to reject the said application below Ex.54, by which plaintiffs have prayed for calling witness summons and production of other documents made therein as prayed for in this application.

2. The facts giving rise to this application are as under:-

2:1. The plaintiff No.1 is a partnership firm, registered under the Indian Partnership Act. The plaintiff Nos.2 and 3 are the partners and plaintiff No.2 is a Managing Partner thereof. It appears from the record that from some time, the plaintiff - Firm has become also sole proprietor. However, subsequently, other partners were indicated in this behalf. The plaintiff - Firm was carrying the business of advertising, designing, block making, media planning etc.

3. Shri Shivabhai Karsanbhai Patel, defendant No.2 was account clerk of State Bank of Saurashtra, defendant No.1 in the suit. The defendant No.1 is a Nationalised Bank having its head Office at Bhavnagar and a branch Office at Ahmedabad. The plaintiff - Partnership Firm had opened a current account with defendant No.1 - Bank.

4. It was the case of the plaintiffs in the suit as well as in the application that the respondent No.2 herein while in service of the applicants, interalia forged the signatures of the applicant No.2 in 16 cheques and took away an amount of Rs.57,166.00 from the applicants' account with respondent No.1. It was further the case of the applicants that by casual approach and wilful omission on the part of the officers of the respondent No.1 in verifying and comparing the signatures on the said cheques with the specimen signature, the respondent No.1 facilitated the perpetration of fraud by respondent No.2 and therefore respondent No.1 was also liable with respondent No.2 for the amount claimed in the suit.

5. In view of the same, a Criminal Complaint No.2499 of 1991 was also lodged for the fraud committed by respondent No.2 with the applicants which was pending before the Metropolitan Magistrate's Court No.5, Ahmedabad. In the said Criminal Complaint, following original documents came to be produced :-

1. Counterfoils of Cheque No.8649878 dated 10.09.79.
2. Cheque No.8649878 dated 11.09.79.

3. Counterfoil of Cheque No.8649897 dated 18.09.79.
4. Cheque No.8649897 dated 19.09.79.
5. Cheque No.8649918 dated 23.11.79.
6. Cheque No.8649928 dated 03.12.79.
7. Cheque No.8649939 dated 05.01.80.
8. Cheque No.8649955 dated 19.02.80.
9. Cheque No.8649959 dated 04.03.80.
10. Cheque No.8649966 dated 16.04.80.
11. Cheque No.8649967 dated 28.04.80.
12. Cheque No.8649969 dated 29.05.80.
13. Cheque No.8649970 dated 01.06.80.
14. Cheque No.8649971 dated 26.06.80.
15. Cheque No.8649972 dated 18.06.80.
16. Cheque No.8649973 dated 23.06.80.

6. In the said complaint, a report of the Handwriting expert was also produced together with its accompaniments, supporting papers and annexures.

7. In the present suit, the original advocate for the respondent No.1 was Shri Sudhir Shah who unfortunately expired in or about March, 1990 and thereafter a fresh notice was issued to respondent No.1 on 19.03.1990. Since none appeared for respondent No.1 the suit was ordered to be undefended against respondent No.1 on 05.04.1990. Thereafter issues were framed on 03.08.1999 at Ex.46 and once again a notice was issued to respondent No.1 on 03.08.1999. The respondent No.1 ultimately appeared in the suit through Advocate Shri S. P. Shah on 07.09.1999 and applied for time. The matter thereafter was adjourned from time to time and adjourned on 21.02.2000.

8. During the pendency of the aforesaid proceedings, the plaintiffs - applicants herein filed an application at Ex.54 on 21.02.2000 with the prayer to issue a witness summons as stated in the said application and also prayed further that trial Court may be pleased to issue witness summons to the Metropolitan Court, Ahmedabd to produce the list of documents which were mentioned in the said application before the Hon'ble Court. The said application was supported by the affidavit of one Mr.Mannan Shah, a partner of the partnership firm. On 14.02.2000, the advocate for defendant no.2 endorsed that he has no objection to grant the said application.

9. The said application came up of hearing before the learned Judge on 14.02.2000. The learned Judge was please to reject the said application. The learned Judge was pleased to hold that the said application has not been moved in the form of Chamber Summons as required

under the City Civil Court Rules, the same is not made within the prescribed time limit under Order XVI of Civil Procedure Code. There is nothing on record to suggest that the Mannan Shah is the partner of the plaintiff no.1 - firm. It was further observed that the particulars and status about the criminal case and its relevance to the present suit, have not been mentioned in his affidavit.

10. Mr.A. N. Bhatt, learned counsel for the petitioners has filed this revision application on 20.10.2000 and on 06.11.2000, this Court has passed the following order:

"Rule returnable on 21/11/2000. Meanwhile, the learned advocate for the petitioners is requested to annex the copy of the plaint."

Though Rule has been served on the respondents, nobody appeared on behalf of the respondents.

11. The learned counsel for the petitioners submits that the order of the learned Judge refusing a witness summons is incorrect. The learned Judge has committed irregularities in exercising of her jurisdiction. The learned counsel for the petitioners has also submitted that if the order which has been passed by the learned Judge, if the same is allowed to stand then the same would result failure of justice.

12. Before I examine the contentions of learned counsel for the petitioners. I will refer to the certain statutory provision by this behalf. Section 30 of the Code of Civil Procedure reads as follows.

30. Power to order discovery and the like.

30. Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party,-

(a) XXXXX

(b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;

(c) order any fact to be proved by affidavit.

Order-16, Rule-1 of the Code of Civil Procedure reads as follows:-

Order-16, Rule 1 : List of witnesses and summons to witnesses.

- (1) On or before such date as the Court may appoint, and not later than fifteen days after the date on which the issues are settled, the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents and obtain summonses to such persons for their attendance in Court.
- (2) A party desirous of obtaining any summons for the attendance of any person shall file in Court an application stating therein the purpose for which the witness is proposed to be summoned.
- (3) The Court may, for reasons to be recorded, permit a party to call, whether by summoning through Court or otherwise, any witness, other than those whose names appear in the list referred to in sub-rule(1), if such party shows sufficient cause for the omission to mention the name of such witness in the said list.
- (4) Subject to the provisions of sub-rule(2), summonses referred to in this rule may be obtained by the parties on an application to the Court or to such officer as may be appointed by the Court in this behalf.

12:1 The learned counsel for the petitioners has also relied upon Ahmedabad, City Civil Court Rules particularly Chapter IV, which provides Chamber work relating Business. Rule-29 which provides Chamber work will ordinarily and so far as Time allows be disposed of on Thursdays and Rule-30 which provides, Disposal of Chamber work in Commercial Causes. The learned counsel for the petitioners has referred to Rule-32 which provides the Judge's Summons to be issued and Rule-35 which provides Chamber work which may be disposed of by a Judge in Chambers.

13. The learned counsel has also tendered the copy of the plaint before this Court and he has stated that in the suit, plaintiffs have alleged that original defendant No.2 applicant herein has committed fraud and, therefore, the plaintiffs have prayed a decree to Rs.1,44,608.00 at the relevant time from defendant No.2. Being the amount of cheques have taken away by the defendant No.2 and unauthorized paid by the defendant No.1 alongwith 18%

interest, the plaintiffs have prayed a decree against both the defendant Nos.1 and 2. The learned counsel contended that the learned Judge ought to have considered these contentions raised in the plaint alongwith the copy of this application which has been filed under section 30 of the Code of the Civil Procedure. This application is for calling witness summons to the Registrar, The Metropolitan Magistrate's Court, Ahmedabad to send a conversant officer or clerk to produce from the record of the Criminal Complaint No.2499 of 1991 pending before the Metropolitan Magistrate Court No.5 and further original documents which have been stated in the said application. He submitted that the order of the learned Judge is liable to be set aside because the same is contrary to and inconsistent with section 30 read with Order-16 of the Code of Civil Procedure.

14. The learned counsel for the petitioners has relied upon the judgment of this Court in the case RAHULBHAI M. GODADHARA v/s. VIJAY MAFATLAL SHAH & OTHERS, reported in 24(1) G.L.R. 602. This Court has observed in para-(5) are as under:-

"Therefore the question ought to have been decided by the Tribunal by making a reference to these Rules. The only question which ought to have been posed and decided by the Tribunal was as to whether examining a witness as requested by the petitioner was necessary for a just decision of the case. In this case the witness is required to be examined by the petitioner for the purpose of showing the loss of future prospects of the petitioner in service and according to the petitioner the witness is in a position to depose on this point. In this view of the matter, the examination of the witness will be definitely necessary for the purpose of arriving at a just decision of the case."

15. The learned counsel for the petitioner has also relied upon the judgment of the Hon'ble Appex Court in the case of LALITHA J. RAI v/s. AITHAPPA RAI, reported in AIR 1995 Supreme Court 1984, wherein the Hon'ble Supreme Court has held in para-(3) are as under :-

It would, thus, be seen that the legislature did not put a total prohibition on the party to produce the witnesses or the production of the documents for proof of the respective case. Nonetheless, when they seek the assistance of the

Court, they are enjoined to give reasons as to why they have not filed the application within the time prescribed under Rule 1 of Order 16. It is seen that in the application it was stated by the husband of the appellant that they were under the bona fide impression that they have already filed the list of the witnesses along with the documents and that the mistake of non-filing the list was discovered when they were getting ready for the trial. It is not in dispute that the trial is yet to begin. In these circumstances, we think that the trial Court committed illegality in refusing to receive the list for summoning the witnesses for adducting of evidence by the plaintiff. The appeal is accordingly allowed."

16. The learned counsel for the petitioners has also relied upon the judgment in the case of CHANDRAKANT VISHNU DESSAI AND OTHERS V/S. VINAYAK VITHAL NAIK AND ANOTHER 1998 GOA page-1, wherein, para-(6), (7) and (8), the learned Judge has observed as under :-

Para-6 "The learned Trial Judge has not cared to examine all these aspects. He laid much emphasis on the technicality of the provision and wanted to dispose of the case without carrying to advance the cause of justice. In such matters the trial Court should take liberal attitude and should not stick to technicalities.

Para-7 This apart, in the present case, it appears an application for summoning four witnesses was filed on 20th day of December, 1977 (at page 95 of the lower Court's record), within 15 days of 9-12-1977 when issues were framed. It is true that the plaintiffs have not referred to this petition in his application dated 26-4-1978, wherein it was on the other hand stated that through oversight no such petition was made. Be that as it may, the fact remains that in fact the plaintiffs had filed an application within the specified time.

Para-8 I am therefore of the opinion that the learned trial Judge wrongly refused plaintiffs' application. In this way he

exercise of jurisdiction vested in him.
It is therefore a fit case to be
interfered with in revision."

17. In my view, section 30 empowers the Court to issue summons to witnesses to persons whose attendance is required either to give evidence or to produce documents or such other objects or order any fact to be proved by affidavit.

18. The learned counsel for the petitioner has relied upon the judgment in the case of Harcharan Singh v/s. State of Punjab and others, reported in AIR 1984 Punjab and Haryana 382 delivered by M. M. Punchhi, J. (as he was then), wherein it has been observed in para-4 at page-383 as under :-

"Amongst others, summoning and enforcing the attendance of any person and requiring the discovery and production of any document are matters regarding which the powers of the Civil Court are exercisable by the Registrar. Under section 30, Civil P.C., the Civil Court is empowered to issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as indicated therein. Under section 32, Civil P.C., the Court can impose penalty for default. To further that object, the Court may compel the attendance of any person, to whom summonses have been issued under section 30 and for that purpose may (a) issue a warrant for his arrest; (b) attach and sell his property; (c) impose a fine upon him not exceeding five hundred rupees; (d) order him to furnish security for his appearance and in default commit him to the civil prison. Under O.XVI, R.5, Civil P.C., the time and place of attendance is to be specified in the summons for the attendance of a person to give evidence or to produce a document. Under R.6 thereof, any person may be summoned to produce a document, without being summoned to give evidence, and that person may cause such document to be produced in place of personally attending to produce the same."

"No specific provision has been brought to my notice from which it can be gathered that compulsion can be exercised against a person to produce documents. Such, power, however, cannot be said to be absent with the Court. Section 151

Civil Procedure Code, is the reservoir of that power whereunder inherent powers can be exercised by the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

The learned counsel for the petitioners has also relied upon the judgment in the case of Ammu Ammal v/s. Venkitadri Iyer, reported in 1980 K.L.T. 929, wherein it has been observed in para-(3) and (4) as under :-

Para-3 :-

"S.30 of the Code of Civil Procedure, 1908 confers jurisdiction on the court to make such orders as may be necessary or reasonable in all matters relating to (among others) the delivery and answering of interrogatories at any time either of its own motion or on the application of any party. This power is wide enough to make the court competent to direct any party to answer interrogatories at any time before the suit is decreed, and after the suit is decreed in execution proceedings. The section aforesaid appears to follow the English procedure which enables the court to order discovery in any 'cause' or 'matter' in the Supreme Court to which the rules of the Supreme Court apply."

Para-4 :-

"At any rate I am not prepared to say that the execution court has no jurisdiction to direct the opposite party on whom the interrogatories have been served to answer the same. This jurisdiction is vested in a court under S.30 of the Code as already pointed out, be it that court is trying a suit or executing a decree."

19. The learned counsel has relied upon Chapter-IV of the Partnership Act which provides the relations of partners to third parties. He has also relied upon section 18 which provides a partner is the agent of the firm for the purpose of the business of the firm. Section 19 which provides Implied authority of partner as agent of the firm, it provides that the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. Section 20 which provides extension and restriction of partner's implied authority. Section 22 which provides mode of doing act to bind firm, it provides that in order to bind

a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm. The learned counsel for the petitioner has also relied upon section 182 of the Contract Act which provides that an "agent" is person employed to do any act for another or to represent another in dealings with third person. In view of this provisions of the Partnership Act, when the present application has been filed by Shri Mannan Shah who is partner of the plaintiff-firm, the said partner had authority to file this application.

20. I have considered all these submissions made by the learned counsel for the petitioner. In my view, as per section 30(b) of the Code of Civil Procedure read with Order-16 of the Code of Civil Procedure and as per the provisions of City Civil Court Rules, the present application has been moved in consonance with the provisions of City Civil Court Rules and also the Court has ample powers under section 30(b) of the Code of Civil Procedure read with Order-16 of the Code of Civil Procedure. The Court has power and jurisdiction to issue summonses to person whose attendance is required either to give evidence or to produce documents. In my view, section 30 does not provide at any time limit and in fact at any time, the application can be filed. In my view, looking to section 30 of the Code of Civil Procedure and also judgment of Panjab and Haryana and also the judgment of Kerala High Court, the present application has been filed within time limit as still suit has to go for trial. In my view in the application, wherein it is stated that Shri Mannan Shah is a partner of the plaintiff-Firm, there is no reason to disbelieve the applicant that he is not a partner of the plaintiff-Firm. In my view, in the application read with provide the particular and states of Criminal Case and it is relevant to the present suit. In my view, therefore, the present application filed under section 30 of the Code of Civil Procedure read with Order-16 of the Code of Civil Procedure and City Civil Court Rules, the present application ought to have been allowed. I do not agree with the reasoning given by the learned Judge in her judgment dated 14th August, 2000 for rejecting the application. I, therefore, quashed and set aside the said order in this behalf.

21. In view of the same, this petition is allowed. The order of the learned Judge dated 21st February, 2000 is quashed and set aside. In view of the same, the matter is remanded to the learned City Civil Court and

direct the learned Judge to hear again the application
Ex.55 and decided in accordance with law. Rule is made
absolute.

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(vrp)*